RECORD AND BRIEFS.

No. 16-111

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MASTERPIECE CAKE SHOP, LTD.;
AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION; CHARLIE CRAIG;
AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

AMICI CURIAE BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are national organizations representing elected and appointed local government officials and the attorneys who represent them. Many local governments that belong to these national organizations have adopted public accommodation ordinances that prohibit discrimination on the basis of sexual orientation. These local governments have an interest in the validity of these ordinances, including their application to wedding businesses.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

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[1] Pursuant to Supreme Court Rule 37.6, amici represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this amici curiae brief.

SUMMARY OF ARGUMENT

Local governments have a long history of protecting people against discrimination when the federal government has been unwilling or unable to legislate. Protecting citizens against sexual-orientation discrimination for many local governments is part of that proud tradition.

Over 100 local governments in thirty-eight states have adopted ordinances protecting citizens from sexual-orientation discrimination in public accommodations. These large and small cities and counties can be found in every region of the country. Although some are located in States that have statewide laws prohibiting sexual-orientation discrimination in places of public accommodation, others are located in twenty-two of the twenty-nine States that do not have such statewide measures.

Local governments have adopted these ordinances at the level of government closest to the people after careful and thoughtful deliberation. They believe that such ordinances are key to creating and maintaining vibrant, safe, healthy communities that are attractive places to live and to work.

These laws work best if there are no exceptions. Exceptions for wedding businesses would weaken and undermine the democratic choices of these cities and States.

However, if the Court believes there may be instances where such exceptions are appropriate, this is not the proper case to create an exception. The facts in the record are too undeveloped to consider, much less to craft, an exception.

I. THIS COURT SHOULD NOT CREATE EXCEPTIONS TO STATE LAWS AND LOCAL ORDINANCES THAT PROHIBIT BUSINESSES FROM DISCRIMINATING AGAINST CUSTOMERS ON THE BASIS OF THEIR SEXUAL ORIENTATION.

A. State and Local Civil Rights Laws Have Often Laid the Groundwork for Federal Statutory and Constitutional Protection of Individual Rights.

Colorado amended its anti-discrimination statute in 2008 and expanded the coverage of its public accommodations provisions to prohibit discrimination based on sexual orientation. *See* Colo. Rev. Stat. Ann. § 24-34-601. This democratic, political decision to protect lesbian, gay, bi-sexual, and transgender (LGBT) individuals' access to goods and services in the public market, including goods and services provided by wedding businesses, falls well within the traditional power of state and local governments.

States, like Colorado, and local governments have, on many occasions in the past, enacted anti-discrimination measures to protect their citizens in the absence of federal statutory or constitutional protection. Colorado's public accommodations law is one important part of our Nation's rich history of citizens' deciding—at the levels of government closest to the people—to vindicate the "individual dignity" of their fellow citizens and to ensure the full "benefits of wide participation in political, economic, and cultural life" for their communities. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). This Court should not read any exceptions into such public accommodations statutes and ordinances.

States and local governments, for example, expanded suffrage to include women long before the Nineteenth Amendment was ratified in 1920. Karen M. Morin, *Political Culture and Suffrage in an Anglo-American Women's West*, 19 Women's Rights L. Rep. 17, 17-18, 20 (1997). Similarly, many state and local governments protected their citizens against race discrimination in public accommodations decades before Title II of the Civil Rights Act of 1964. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 & n.8 (1964) (noting that thirty-two States and "many cities" had enacted laws protecting against race discrimination prior to 1964).

States, territories, and municipalities across the United States started to grant women the right to vote as early as 1869. Morin, *Political Culture and Suffrage*, at 20; *see also* JoEllen Lind, *Dominance and Democracy: the Legacy of Woman Suffrage for the Voting Right*, 5 UCLA Women's L.J. 103, 185 (1994). Wyoming and Utah, as territories, recognized women's right to vote and were the first two States to extend suffrage to their female citizens. Morin, at 20. By 1918, two years before ratification of the Nineteenth Amendment, twenty-one States had adopted some form of women's suffrage by legislation, by ballot votes, or by state constitutional amendment. *Id.*; *see Victory map 1919*, National Woman Suffrage Publishing Co. (1919), from Norman B. Leventhal Map Center at the Boston Public Library, http://brilliantmaps.com/1919-womens-suffrage-victory/ (showing that some States had granted women full suffrage and others limited suffrage in presidential elections, municipal elections, or other limited elections).

Suffragists understood that States and local governments were well-situated to respond to the demands

of their citizens. *See* Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 U. Ill. L. Rev. 265, 273 (1994) (noting that the American Woman Suffrage Association was "said to be primarily committed to obtaining woman suffrage at the state and municipal levels"). They devoted particular attention to municipal elections.

At the National Suffrage Convention in 1902, for example, one speaker argued that achieving municipal voting rights would demonstrate to other cities, States, and the federal government the benefits of full women's suffrage. Oswald Garrison Villard, Speech at the National Suffrage Convention in Washington, D.C. (Feb. 14, 1902), *in Women in the New York Municipal Campaign of 1901*, https://www.loc.gov/resource/rbnawsa.n8366/?sp=1 (last visited Oct. 22, 2017).

This speaker believed that women in California should gather momentum at the municipal level in order to secure enactment of state legislation granting full voting rights to women. *See* Reports of Committees of the College Equal Suffrage League of Northern California, *Winning Equal Suffrage In California* (National College Equal Suffrage League, 1912) 120, 125, https://babel.hathitrust.org/cgi/pt?id=hvd.32044087354213;view=1up;seq=128 (last visited Oct. 22, 2017) (indicating that efforts were made on a municipal level to further the cause of national women's suffrage).

The Nineteenth Amendment, in turn, was drafted by Senator Aaron Sargent of California, and it echoed the sentiments expressed in the California Suffrage Act. *See* Gwen Hoerr Jordan, *Horror of a Woman: Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence*, 42 Akron L. Rev. 1201, 1229 (2009); *compare* Cal. Prop.

No. 4 (1911), https://sfpl.org/pdf/libraries/main/sfhistory/suffrageballot.pdf, *with* U.S. Const. amend. XIX. It gained initial approval and ultimately ratification in States that had previously recognized women's right to vote at a state-wide or municipal level. *See Victory map 1919*, Boston Public Library.

Much as the States and local governments advanced women's suffrage before the adoption of the Nineteenth Amendment, they also led the efforts to prohibit racial discrimination. In 1865, in the wake of the Civil War, Massachusetts became the first State to enact legislation prohibiting discrimination because of race or color in places of public accommodation. Lisa G. Lerman & Annette K. Sanderson, Comment, *Discrimination in Access to Public Places: A Survey of State and Federal Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 238 (1978). In the subsequent decade, ten States—six southern and four northern—enacted similar public accommodations laws protecting against race discrimination. Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862-1952*, 20 U. Chi. L. Rev. 363, 405 (1953).

When the Court invalidated the 1875 "federal counterpart" of these state public accommodations laws in the *Civil Rights Cases*, 109 U.S. 3 (1883), "it emphasized that state laws imposed a variety of equal access obligations on public accommodations." *Roberts*, 468 U.S. at 624. Then, "[i]n response to [*Civil Rights Cases*], many more States . . . adopted statutes prohibiting racial discrimination in public accommodations." *Id.*; *see* Milton R. Konvitz, The Constitution and Civil Rights 8, 109 (1947).

By 1909, eighteen States had adopted laws prohibiting race discrimination in public accommodations. Maslow & Robison, *Civil Rights Legislation*, at 405 n.222 (listing California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Washington, and Wisconsin); *see* Konvitz, The Constitution and Civil Rights at 208 (comparing coverage and other provisions of state civil rights statutes). Following the *Civil Rights Cases*, these state and local public accommodation laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957." *Roberts*, 468 U.S. at 624.[2]

From the late 1800s until the mid-1900s, as in the women's suffrage movement, States and local governments did not use a one-size-fits-all approach to their public accommodation laws. Rather, States differed greatly in their definitions of "public accommodations," with some protecting against race discrimination only in travel, hotels, and places of amusement and others providing more comprehensive protection, including in health and welfare facilities and insurance. *See Civil Rights Map of America, 1949*, Library of Congress (076.00.00), http://www.loc.gov/exhibits/civil-rights-act/world-war-ii-and-post-war.html#obj076 (last visited Oct. 26, 2017) (showing variation amongst

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[2] The Civil Rights Act of 1957 was the first federal civil rights legislation passed after the *Civil Rights Cases*. The Civil Rights Act of 1957 established the Civil Rights Division in the Justice Department and created a Civil Rights Commission to investigate deprivation of citizens' voting rights based on race, color, or national origin. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 634.

the States in forbidding or allowing discrimination, and the types of discrimination proscribed). These various state and local public accommodation laws provided some protection for African Americans at a time when the federal government, for a variety of reasons, was slow to act. *See* Risa Goluboff, *Civil Rights History Before, and Beyond, Brown, in* Why the Local Still Matters: Federalism, Localism, and Public Interest Advocacy 11, 18 (2009).

In the late 1940s and early 1950s, state and local governments made similar democratic efforts to combat discrimination in employment. In 1945, New York became the first State to prohibit race discrimination in employment, N.Y. Exec. Law §§ 125-136; and Chicago became the first city to do so. *See* Alex Elson & Leonard Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 Yale L.J. 431, App. 1 (1947) (discussing state and local efforts to end employment discrimination). Many other state and local governments followed suit, so that, prior to Title VII of the Civil Rights Act of 1964, thirty cities and twenty States had enacted fair employment laws.[3]

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[3] State and local governments made similar efforts in education and housing. Prior to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which proscribed racial segregation in public schools, some state and local governments had already prohibited segregation in education through anti-discrimination laws. *See, e.g.*, Maslow & Robison, *Civil Rights Legislation*, at 410-11 (describing New York's, Massachusetts', and New Jersey's laws prohibiting race discrimination in educational institutions); *see also* Mary Melcher, *Blacks and Whites Together: Interracial Leadership in the Phoenix Civil Rights Movement*, J. of Ariz. History 32, 195-216 (Summer 1991) (providing a comprehensive discussion of the state and local democratic efforts to prohibit racial discrimination in Phoenix). Similarly, by the early 1950s, nine States and several municipalities had enacted laws and ordinances prohibiting race

John P. McQuillan, *Municipal Fair Employment Ordinances as A Valid Exercise of the Police Power*, 39 Notre Dame L. Rev. 607, 607 (1964).

Many courts upheld these democratic efforts of the state and local governments against a rich variety of complaints, including alleged burdens on economic and religious interests. Goluboff, *Civil Rights History Before, and Beyond, Brown*, at 15 n.17 (noting that there are "numerous state cases" from this time vindicating the statutory rights of individuals under state and local anti-discrimination laws); *see, e.g., State v. Katz*, 40 N.W.2d 41 (Iowa 1949); *Denny v. Dorr*, 78 N.E.2d 114 (Ill. App. Ct. 1948); *People v. Bob-Lo Excursion Co.*, 27 N.W.2d 139 (Mich. 1947). This lesser-told story of the civil rights movement shows that, in the late 1940s through early 1960s, state and local governments led efforts to protect against discrimination before the federal government could, or was willing to, enact legislation prohibiting racial discrimination. *See* Goluboff, *Civil Rights History Before, and Beyond, Brown*, at 18 (arguing that "widening the lens of legal and constitutional history to include civil rights advocacy among state courts and legislatures . . . reveals alternative conceptions of civil rights").

As the above discussion illustrates, oftentimes when the federal government has been weak on protecting its citizens from discrimination, States and local governments have stepped up to the plate. The bottom-up efforts of citizens at the state and local levels to protect their fellow citizens from discrimination based on sexual orientation fills the gap between the

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discrimination in the selection of tenants. Maslow & Robison, *Civil Rights Legislation*, at 409-10.

Supreme Court's decisions and congressional inaction and provides protection that would be significantly undercut by any judicially-created exception for wedding businesses.

B. Citizens of 21 States and of More Than 100 Local Governments Have Decided to Protect Their Fellow Citizens Against Sexual-Orientation Discrimination in Places of Public Accommodation.

Just as state and local governments took the lead in promoting women's suffrage and in prohibiting racial discrimination in public accommodations and in employment, they are now leading the way in prohibiting discrimination against LGBT persons in public accommodations. *See* Peter M. Cicchino, et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 Harv. C.R.-C.L. L. Rev. 549, 550 (1991) (arguing that "the recent failures of federal legislation to address the needs of gay and lesbian people have made the state courts and legislatures particularly attractive as fora for securing gay and lesbian civil rights"). Creating exceptions for wedding businesses will weaken the protections of these laws nationwide.

The Court has addressed the evils of discrimination based on sexual orientation. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the right to marry includes same-sex couples); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (interpreting "marriage" and "spouse" in Section 3 of the Defense of Marriage Act as including same-sex unions); *Romer v. Evans*, 517 U.S. 620, 624 (1996) (holding a state constitutional amendment that prohibited all state legislative, executive, and judicial action protecting LGBT people unconstitutional); *Lawrence v. Texas*, 539 U.S. 558,

572-73 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), in part on the ground that in the seventeen years after *Bowers* was decided the number of States criminalizing sodomy had been reduced from twenty-five to thirteen and holding that a Texas statute prohibiting homosexual sodomy was unconstitutional).

Congress, however, has not provided federal statutory protection against discrimination based on sexual orientation in places of public accommodation.[4] Title II of the Civil Rights Act of 1964 does not include "sexual orientation" as a ground for protection against discrimination in places of public accommodation. *See* 42 U.S.C. § 2000a ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

Citizens at the state and local levels have filled the federal void and "counter[ed] discrimination by enacting detailed regulatory schemes." *See Romer*, 517 U.S. at 628; *Roberts*, 468 U.S. at 624 (noting that the States "progressively broadened the scope of [their] public accommodations law[s] . . . both with respect to

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[4] Congress has enacted a few provisions protecting LGBT persons. The Hate Crimes Act, for example, imposes a heightened punishment for causing or attempting to cause bodily injury "to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person." 18 U.S.C. § 249(a)(2)(A). Also, the Violence Against Women Act prohibits federally-funded programs and activities from discriminating "on the basis of actual or perceived race, color, religion, national origin, sex, gender identity . . . sexual orientation, or disability." 34 U.S.C. § 12291(b)(13)(A).

the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden").

Twenty-one States and the District of Columbia now prohibit discrimination based on sexual orientation in public accommodations.[5] *State Public Accommodation Laws*, National Conference of State Legislatures (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (last visited Oct. 22, 2017).

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[5] Nineteen States and the District of Columbia prohibit discrimination based on sexual orientation in areas or places of public accommodation: Colorado (Colo. Rev. Stat. § 24-34-601); Connecticut (Conn. Gen. Stat. §§ 46a-64, 46a-81d); Delaware (6 Del. Code § 4504); Hawaii (Hawaii Rev. Stat. § 489-3); Illinois (775 Ill. Comp. Stat. §§ 5/1-102(A), 5/1-103(Q)); Iowa (Iowa Code § 216.7); Maine (Me. Rev. Stat. tit. 5 §§ 4591, 4592); Maryland (Md. Code, State Gov't § 20-304); Massachusetts (Mass. Gen. Laws Ch. 272, §§ 92A, 98); Minnesota (Minn. Stat. § 363A.11); Nevada (Nev. Rev. Stat. tit. 54 §§ 651.050, 651.070); New Hampshire (N.H. Rev. Stat. §§ 155:39-A, 354-A:17); New Jersey (N.J. Stat. §§ 10:5-5, 10:5-12); New Mexico (N.M. Stat. §§ 28-1-2, 28-1-7(F)); Oregon (Or. Rev. Stat. §§ 659A.400, 659A.403); Rhode Island (R.I. Gen. Laws §§ 11-24-2, 11-24-3); Vermont (Vt. Stat. tit. 9 §§ 4501, 4502); Washington (Wash. Rev. Code §§ 49.60.040, 49.60.215); Wisconsin (Wis. Stat. § 106.52); and the District of Columbia (D.C. Code §§ 2-1401.02, 2-1402.31).

Two States do not limit their prohibitions of discrimination based on sexual orientation to places or areas of public accommodation. California prohibits discrimination based on sexual orientation in "all business establishments of every kind whatsoever." Cal. Civ. Code § 51. New York prohibits sexual-orientation discrimination "by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state." N.Y. Civil Rights Law § 40-C; *see* N.Y. Executive Law § 292.

More than one hundred cities and counties across the country also prohibit sexual-orientation discrimination in places of public accommodation. Human Rights Campaign, Equality Federation Institute, *Municipal Equality Index: A Nationwide Evaluation of Municipal Law – 2016*, at 23, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/MEI-2016-Final-Online.pdf (last visited Oct. 22, 2017). Cities in at least thirty-eight States have enacted public accommodation ordinances prohibiting discrimination based on sexual orientation.[6] These

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[6] *See, e.g.*, Anchorage, Ala., Code § 5.20.050 (2015); Tucson, Ariz., Code § 17-1 (1999); Los Angeles, Cal., Municipal Code ch. 4, art. 12, § 49.74 (1979); Aspen, Colo., Code § 15.04.570 (1977); New Haven, Conn., Charter Preamble (1993) (expressing general policy to prohibit discrimination based on sexual orientation in accordance with state public accommodation statute); Wilmington, Del., Code § 5-57 (2000); Broward County, Fla., § 16½-34 (2011); Atlanta, Ga., Code § 94-67 (2016); Boise, Idaho, Code § 6-02-03 (2012); Berwyn, Ill., Code § 620.01 (2008); Carmel, Ind., Code § 6-8 (2015); Coralville, Iowa, Code § 26.05 (2015); Manhattan, Kansas, Code § 10-17 (2016); Covington, Ky., Code § 37.07 (2003); Shreveport, La., Code § 39-2 (2013); Orono, Me., Code art. 4, § 24-44 (1996); Montgomery County, Md., Code § 27-11 (2007); Boston, Mass., Municipal Code § 12-9.7 (2002); Saugatuck, Mich., Code § 130.03 (2007); Minneapolis, Minn., Code tit. 7 § 139.40(i) (2006); Jackson, Miss., Code art. 10, § 86-302 (2016); Creve Coeur, Mo., Code § 230.060 (2012); Missoula, Mont., Code §§ 9.64.020, 9.64.040 (2010); Omaha, Neb., Municipal Ordinance § 13-84 (2012); Durham, N.H., Res. #2016-01 (2017); Rochester, N.Y., Code §§ 63-2, 63-3 (2014); Toledo, Ohio, Code §§ 554.04, 554.05 (2017); Corvallis, Or., Code § 1.23.070 (2007); Swarthmore, Pa., Code § 207.03 (2006); Providence, R.I., Code § 16-59 (2014); Folly Beach, S.C., Code § 96.02 (2012); Brookings, S.D., Code § 2-143(5) (2015); Dallas, Tex., Code § 46-6.1 (2002); Charlottesville, Va., Code art. 15, § 2-431 (2013); Darrington, Wash., Code § 9.04.580 (1980); Charleston, W. Va., Code § 62-81(6) (2007); Racine, Wis., Code § 62-38 (2010); Laramie, Wyo., Code § 9.32.040 (2015).

cities and counties can be found in every region of the country.[7] Some are large;[8] others are small.[9] Although some of these cities are located in States that have statewide laws prohibiting sexual-orientation discrimination in places of public accommodation, others are located in twenty-two of the twenty-nine States that do not have such statewide measures.[10]

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[7] South: Broward County, Fla., § 16½-34 (2011); Atlanta, Ga., Code § 94-67 (2016); Richland County, S.C., Code §§ 16-66, 16-68 (2011); Charlottesville, Va., Code art. 15, § 2-431 (2013); Austin, Tex., Code § 5-2-4 (1992); North: Orono, Me., Code § 24-44 (1996); Durham, N.H., Res. #2016-01 (2017); Swarthmore, Pa., Code § 207.03 (2006); Boston, Mass., Municipal Code § 12-9.7 (2002); Providence, R.I., Code § 16-59 (2014); Midwest: Chicago, Ill., Municipal Code § 2-160-070 (2088); Columbus, Ind., Code § 9.24.040 (1992); Howell, Mich., Code §§ 209.02, 209.04 (2016); St. Louis, Mo., Code § 3.44.080 (2006); Cleveland, Ohio, Code part 6 § 667.01 (2016); West: Los Angeles, Cal., Municipal Code § 49.74 (1979); Boise, Idaho, Code § 6-02-03 (2012); Salem, Or., Code § 97.060 (2009); Seattle, Wash., Code § 14.06.030 (2004).

[8] Large cities include Chicago, Boston, New York, and Dallas. *See* Chicago, Ill., Municipal Code § 2-160-070 (1988); Boston, Mass., Code § 12-9.7 (2002); New York, N.Y., Administrative Code § 8-107 (1986); Dallas, Tex., Code § 46-6.1 (2002).

[9] Smaller communities include Coralville, Iowa, Danville, Kentucky, Orono, Maine, Folly Beach, South Carolina, Darrington, Washington, and Laramie, Wyoming. *See* Coralville, Iowa, Code § 26.05 (2007); Danville, Ky., Code § 5.5-5 (2014); Orono, Me., Code § 24-44 (1996); Folly Beach, S.C., Code § 96.02 (2012); Darrington, Wash., Code § 9.04.580 (1980); Laramie, Wyo., Code § 9.32.040 (2015).

[10] *See, e.g.*, Anchorage, Ala., Code § 5.20.050 (2015); Tucson, Ariz., Code § 17-1 (1999); Broward County, Fla., § 16½-34 (2011); Atlanta, Ga., Code § 94-67 (2016); Boise, Idaho, Code § 6-02-03 (2012); Carmel, Ind., Code § 6-8 (2015); Manhattan, Kan., Code § 10-17 (2016); Covington, Ky., Code § 37.07 (2003); Shreveport, La., Code § 39-2 (2013); Saugatuck, Mich., Code § 130.03 (2007); Jackson, Miss., Code art. 10, § 86-302 (2016); Creve Coeur,

In the absence of federal legislation,[11] many States and local governments have also enacted measures prohibiting sexual-orientation discrimination in private and public employment. The City of East Lansing, Michigan led the way. It enacted an ordinance in 1972 prohibiting discrimination on the basis of "sex or homosexuality" in city employment. East Lansing, Mich., Code § 22-33(b)(1) (1972); *see also* The American Independent Institute, *East Lansing Celebrates Nation's Oldest LGBT Nondiscrimination Law*, http://americanindependent.com/213471/east-lansing-celebrates-nations-oldest-lgbt-nondiscrimination-law (last visited Oct. 22, 2017). By 2003, 136 cities and counties prohibited sexual-orientation discrimination in private employment and 106 did so in public employment. *See* Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 Emory L.J. 515, 527 (2003); *see* Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J.L. & Pol. 53, 71 (2014) ("by 2003, roughly twenty percent of Americans benefited from anti-discrimination protections, under-

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Mo., Code § 230.060 (2012); Missoula, Mont., Code §§ 9.64.020, 9.64.040 (2010); Omaha, Neb., Municipal Ordinance § 13-84 (2012); Toledo, Ohio, Code §§ 554.04, 554.05 (2017); Swarthmore, Pa., Code § 207.03 (2006); Folly Beach, S.C., Code § 96.02 (2012); Brookings, S.D., Code § 2-143(5) (2015); Dallas, Tex., Code § 46-6.1 (2002); Charlottesville, Va., Code art. 15, § 2-431 (2013); Charleston, W. Va., Code § 62-81(6) (2007); Laramie, Wyo., Code § 9.32.040 (2015).

[11] Congress, beginning in 1975, has considered—but not enacted—laws that would prohibit sexual-orientation discrimination in employment. *See, e.g.*, Civil Rights Amendments, H.R. 166, 94th Cong. (1975); Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Equality Act, H.R. 2282, 115th Cong. (2017).

lying their practical effect in filling the regulatory void left by the States and the federal government").

Fourteen years later, at the beginning of 2017, "at least 225 cities and counties" located in thirty-two States "prohibit[ed] employment discrimination on the basis of gender identity" by both public and private employers. *See* Human Rights Campaign, *Cities and Counties with Nondiscrimination Ordinances that Include Gender Identity*, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender (last visited Oct. 22, 2017) (listing 225 cities and counties in thirty-two States and the District of Columbia). In addition to these ordinances, twenty-two States prohibit sexual-orientation discrimination in private employment, and "[m]any states have executive orders or laws that protect all public employees." *See* Movement Advancement Project, *Equality Maps*, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Oct. 22, 2017).

At the most democratically responsible—and responsive—levels of government, the citizens of 21 States, of the District of Columbia, and of more than 100 local governments have decided to protect their fellow citizens against discrimination based on sexual orientation in places of public accommodation and in employment. They have—consistent with this Court's decisions—identified a "trait[] which cannot be the basis for discrimination." *Romer*, 517 U.S. at 629.

Colorado provides an instructive example of the interplay of decentralized, democratic decision-making at the state and local levels. In 1977, Aspen was the first Colorado community to enact an ordinance prohibiting discrimination based on sexual orientation in public accommodations, as well as in housing, employ-

ment, education, and health and welfare services. *Id.* at 623-24. Two other Colorado cities, Boulder in 1987 and Denver in 1990, followed suit. *See Romer*, 517 U.S. at 624 (citing the Boulder and Denver ordinances). Other Colorado cities, however, declined to follow Aspen's lead, and, "[f]or example, the voters of Fort Collins and the city council in Colorado Springs . . . rejected proposed ordinances forbidding discrimination on the basis of sexual orientation." Brief for Respondents Roy Romer, as Governor of the State of Colorado et al., *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039, October Term 1994), 1995 WL 17008447, at *6 (June 19, 1995).

In 1992, in response to ordinances like those enacted in Aspen, Boulder, and Denver, Colorado voters adopted an amendment to the Colorado Constitution that forbade the state government and all local governments from enacting or enforcing any law protecting LGBT persons from discrimination based on their sexual orientation. *Romer*, 109 U.S. at 623-24. Twelve years after the Supreme Court held in 1996 that this state constitutional amendment violated the Equal Protection Clause, *see id.* at 635-36, Colorado changed course. In 2008, the state legislature added a prohibition on sexual-orientation discrimination in public accommodations to the statewide anti-discrimination law. *See* S.B. 08-200, 66th Gen. Assembly, 2d Reg. Sess. (Colo. 2008) (amending Colo. Rev. Stat. § 24-34-601 to prohibit sexual-orientation discrimination in public accommodations).

C. The Requirement that Wedding Business Owners Provide Goods and Services to Same-Sex Couples Protects Human Dignity and Promotes the Economic Development of the Community.

The States and local governments that, like Colorado, have decided to protect their citizens from sexual-orientation discrimination in public accommodations have acted after careful and thoughtful deliberation. These States and cities compete constantly to create and maintain vibrant, safe, healthy communities that are attractive places to live and to work. They have determined that protecting their citizens from sexual-orientation discrimination in public accommodations is a critical component of their social and economic development. Exceptions for wedding businesses would weaken and undermine the democratic choices of these cities and States.

In the States and local communities that have decided through their democratic political processes to extend protection of their public accommodations laws to LGBT persons, the officials charged with enforcement of these anti-discrimination provisions have concluded that wedding businesses may not deny goods and services to a same-sex couple and have uniformly rejected religiously-inspired refusals to do business.[12] These decisions parallel the treatment of

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[12] Amici have not discovered any administrative or judicial decisions exempting wedding businesses, as opposed to religious entities, from non-discrimination laws on the basis of religious beliefs about same-sex marriage, and Petitioners have not identified any such decisions. One court has held that businesses, including a wedding business, that do not have physical storefronts are not places of public accommodation either under Wisconsin's public accommodations law, Wis. Stat. § 106.52, or

religious objections to the Civil Rights Act of 1964. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402-03 n.5 (1968) (characterizing free exercise objections as "patently frivolous").

These States and local communities have compelling interests in protecting the right to same-sex marriage by preventing private interference with equal access to the goods and services that are traditional parts of weddings. Beginning in 2004, eleven years before *Obergefell*, cities and counties began to issue marriage licenses to same-sex couples. Richard C. Schrager, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. & Pol. 147, 148-49 (2005) (identifying San Francisco, California; Asbury Park, New Jersey; Sandoval County, New Mexico; Nyack, Ithaca, and New Paltz, New York; Multnomah County and Benton County, Oregon; and several towns in Massachusetts). Many States—by statute and by judicial decision—legalized same-sex marriage before this Court recognized the constitutional right to same-sex marriage. *See Obergefell*, 135 S. Ct. at 2611 (App. B) (listing statutes and

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under section 39.03(2) of the General Ordinances of the City of Madison, Wisconsin. *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17CV0555 (Wis. Cir. Ct. Aug. 11, 2017) (declaratory judgment), https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/amy-lynn-photography-studio-v.-city-of-madison/amy-lynn-photography-studio-v-city-of-madison---order-granting-declaratory-judgment-(as-to-wisconsin-law).pdf?sfvrsn=4; Transcript of Hearing at 1-2, *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17CV0555 (Wis. Cir. Ct. Aug. 1, 2017), https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/amy-lynn-photography-studio-v.-city-of-madison/amy-lynn-photography-studio-v-city-of-madison---hearing-transcript-(2017-08-01).pdf?sfvrsn=4.

judicial decisions of sixteen States and the District of Columbia).

State and local public accommodation laws prohibiting discrimination based on sexual orientation are intrinsically intertwined with the constitutional right to same-sex marriage. As the Minnesota Department of Human Rights (MDHR) recognized after Minnesota enacted its same-sex-marriage law in 2013, this state law "does not exempt individuals, businesses, nonprofits, or the secular business activities of religious entities from non-discrimination laws based on religious beliefs regarding same-sex marriage." Minnesota Department of Human Rights, Minnesota's Same-Sex Marriage Law, https://mn.gov/mdhr/yourrights/who-is-protected/sexual-orientation/same-sex-marriage/ (last visited Oct. 22, 2017). Accordingly, the MDHR determined that "a business that provides wedding services such as cake decorating, wedding planning or catering services may not deny services to a same-sex couple based on their sexual orientation." *Id.* A refusal to provide wedding goods and services to a same-sex couple "would violate protections for sexual orientation laid out in the [public accommodation provisions of the] Minnesota Human Rights Act," Minn. Stat. § 363A.02(3). *Id.*

In addition to their compelling interests in protecting the right of same-sex marriage against private interference, the States and local governments also have compelling interests in vindicating human dignity and in promoting the economic interests of all of their citizens by assuring equal access to publicly available goods and services.

State public accommodation laws "reflect[] [the States'] strong historical commitment to eliminating discrimination and assuring [their] citizens equal

access to publicly available goods and services." *Roberts*, 468 U.S. at 624. This goal of state, as well as local, public accommodation laws, "plainly serves compelling state interests of the highest order." *Id.* The "stigmatizing injury" and "'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments,'" which this Court has recognized are "surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race," are just as surely felt by persons suffering discrimination on the basis of their sexual orientation. *Id.* at 625 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)).

Local governments have particularly important interests in prohibiting discrimination against LGBT persons and, in turn, in promoting economic growth and development for all of their citizens. The City of Laramie, Wyoming, for example, prohibited discrimination based on sexual orientation and gender identity in public accommodations, employment, and housing in May 2015 in order to

> encourage the economic growth of the city, raise revenue for the city for the benefit of its residents, prevent activities that disturb or jeopardize the public health, safety, peace or morality of the city, provide for the health, safety and welfare of the city, and to generally encourage the growth and economic expansion of the city, and the ability of its residents to fully participate in the cultural, social and economic life of the city.

Laramie, Wyo. No. 1681 (5-13-2015), *codified at* Laramie, Wyo., Code § 9.32.010(B).

This relationship between protection of LGBT persons and economic growth is well-established. The Brookings Institution has found that "[t]he key to success in the knowledge-based economy is . . . human capital" and that "a city's diversity—its level of tolerance for a wide range of people—is key to its success in attracting talented people." Richard Florida & Gary Gates, *Technology and Tolerance: The Importance of Diversity and High Tech Growth*, The Brookings Institution (2002), https://www.brookings.edu/articles/technology-and-tolerance-diversity-and-high-tech-growth/ (last visited Oct. 22, 2017).

Many corporations have decided that "a diverse and inclusive workforce is critical for success." *See* Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* (July 2001), https://www.forbes.com/forbesinsights/innovation_diversity/; Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, The Williams Institute (Oct. 2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf (last visited Oct. 22, 2017) (reporting that in 2011, "[a]ll but two (96%) of the top 50 Fortune 500 companies include sexual orientation in their non-discrimination policies and 70% include gender identity"). Amazon, to take but one recent example, has specified "the presence and support of a diverse population" as one criterion for selecting the location of its new, second corporate headquarters. Amazon HQ2 Request for Proposal, https://images-na.ssl-images-amazon.com/images/G/01/Anything/test/images/usa/RFP_3._V516043504_.pdf. (last visited Oct. 26, 2017).

Cities and counties, of course, have learned that making a commitment to diversity and prohibiting

discrimination against LGBT persons is an important means of attracting both these businesses and the people that they want to employ. As the Chairman of Osceola County, Florida explained when the county adopted a new human rights ordinance in 2015 and prohibited discrimination on the basis of sexual orientation and gender identity in public accommodations, employment, and housing, the new ordinance was "a way of Osceola County becoming more inclusive and allowing greater opportunities for people who already live here or who want to live in a diverse community." Ken Jackson, *Osceola County Passes Human Rights Ordinance,* Osceola News-Gazette, Oct. 21, 2017, http://www.aroundosceola.com/osceola-county-passes-human-rights-ordinance (last visited Oct. 22, 2017). The new ordinance "sends a message about our level of commitment to grow and attract the top level of workforce talent that is imperative for Osceola's economic success." *Id.*; *see* Osceola County, Fla. Ordinance No. 2015-50, *codified at* Osceola County, Fla., Code §§ 27-1– 27-19.

Cities and States prohibit sexual-orientation discrimination in public accommodations to create welcoming, diverse, vibrant, safe, and prosperous places to live and to work. Governments have no higher calling. Any judicially-created exceptions to these statutes and ordinances, even narrow ones, would frustrate the purposes for which they were enacted.

II. IF THE COURT BELIEVES IT MIGHT BE APPROPRIATE TO MAKE EXCEPTIONS TO PUBLIC ACCOMMODATIONS LAWS THAT PROTECT CITIZENS ON THE BASIS OF THEIR SEXUAL ORIENTATION, THIS IS NOT THE RIGHT CASE TO CREATE SUCH AN EXCEPTION.

As this brief, Respondents' briefs, and numerous other amici supporting Respondents have explained, this Court should create no exceptions to state laws and local government public accommodations ordinances protecting citizens on the basis of their sexual orientation. However, if the Court believes there may be instances where such exceptions are appropriate, this is not the proper case to create an exception. First, the issues raised by the application of state and local public accommodation laws to wedding businesses and others that oppose same-sex marriage on speech and religious grounds have just begun to percolate. Second, the facts in the record are too undeveloped to consider, much less to craft, an exception.

When this Court decided *Obergefell*, there were 95 state and federal judicial decisions that had previously addressed same-sex marriage issues, as well as 17 state statutes and judicial decisions legalizing same-sex marriage. *Obergefell*, 135 S. Ct. at 2608-11 (Apps. A, B). In the wake of *Obergefell*, however, there are to-date apparently only seven cases, including the case at hand, addressing First Amendment objections to the application of state and local anti-discrimination provisions to wedding businesses. There are two state trial court decisions[13] and three 2017 federal district

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[13] *Brush & Nib Studio, LC v. City of Phoenix*, No. CV2016-052251 (Ariz. Super. Ct., Maricopa Cty. Sept. 16, 2016), https://perma.cc/8P9Z-FW6J (denying wedding invitation business's

court decisions on motions to dismiss and on motions for a preliminary injunction.[14] In addition to the

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motion for preliminary injunction because wedding invitation business was unlikely to succeed on merits of its claim that provisions of the Phoenix Public Accommodations Ordinance would be unconstitutional as applied to require the business to provide the same services and products to same-sex and opposite-sex couples), *appeal docketed*, No. 1 CA-CV 16-0602 (Ariz. Ct. App. Sept. 21, 2016); *Gifford v. McCarthy*, 137 A.D.3d 30, 37 (N.Y. App. Div. 2016) (affirming administrative decision that a venue's refusal to a host a same-sex wedding violated the New York Human Rights Law). A decision by the Oregon Bureau of Labor and Industries that a bakery's refusal to provide a wedding cake to a same-sex couple violated the Oregon Public Accommodations Law has been argued on appeal in the Oregon Court of Appeals. *In the Matter of Melissa and Aaron Klein*, Nos. 44-14, 45-14, 2015 WL 4868796 (Oregon Bureau of Labor and Industries July 2, 2015); *see Klein v. Or. Bureau of Labor & Indus.*, No. CA A15899 (Or. Ct. App. argued Mar. 2, 2017).

[14] *Telescope Media Group v. Lindsey*, Civ. No. 16-4094, 2017 WL 4179899 (D. Minn. Sept. 20, 2017) (granting motion to dismiss wedding videographers' pre-enforcement challenge to a requirement to publicize videos of same-sex weddings online for lack of standing and to a requirement to serve same-sex couples because the claims failed as a matter of law); *303 Creative LLC v. Elenis*, No. 16-cv-02372-MSK-CBS (D. Colo. Sept. 1, 2017) (granting motion to dismiss claims challenging constitutionality of Colorado Anti-Discrimination Act requirement that a wedding website builder must provide services to same-sex couples for lack of standing and denying motions for preliminary injunction and summary judgment, with leave to renew, claims challenging a proposed communication that website services are not provided to same-sex couples), *notice of appeal filed*, No. 17-1344 (10th Cir. Sept. 28, 2017); *Country Mill Farms v. City of East Lansing*, No. 1:17-cv-487 (W.D. Mich. Sept. 15, 2017) (granting motion for a preliminary injunction requiring the city to issue Country Mills a license to sell goods at East Lansing Farmer's Market and enjoining city from enforcing its Farmer's Market guideline that disqualified Country Mills from participating in the market because it refused to book a same-sex wedding at its orchard).

decision of the Colorado Court of Appeals in this case, there is only one other state appellate decision,[15] *Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *petition for cert. filed,* (U.S. July 14, 2017) (No. 17-108), and there are no federal appellate decisions.[16]

Even more important than lower courts having little opportunity to decide wedding business cases, the record reveals very little about the product that Respondents Craig and Mullins wanted to buy, and Petitioner Phillips knows nothing about the product that he refused to sell. Stated another way, the Court cannot determine on the record what exception—other than to deny service outright on the basis of his customers' sexual orientation—Phillips is seeking, and there is no basis for creating an exemption from Colorado's public accommodations law in these circumstances.

As the Solicitor General has explained Craig and Mullins sat at the "cake consulting table." Brief for the United States as Amicus Curiae Supporting Petitioners at 4. There was, however, no "consultation"; there was no discussion of any design, words, or symbols. Phillips admits that he "declined Craig and Mullins's request before learning all the details of the wedding cake they wanted." Petitioners' Brief at 21.

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[15] One state appeal, decided before *Obergefell*, upheld the application of New Mexico's public accommodation provisions to a wedding photography business. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[16] A notice of appeal has been filed in one case, *303 Creative LLC*. *See supra* note 14.

Phillips "knew"—that is he surmised or guessed—that he would be asked to do something contrary to his conscience.[17] In reality, though, Phillips had no idea what type of cake, design, words, or images Craig and Mullins might actually have requested if they had been given the opportunity to discuss a purchase. The two men might have selected one of Phillips' previously created cakes on display in the photo album or in the store. If this were the case, no one argues that Phillips would have had a First Amendment right to refuse to sell Craig and Mullins such a cake.

This case, in short, falls short of raising any concrete First Amendment compelled speech or free exercise issue; it does not raise any question about "creating expression." No actual images, words, or design celebrating same-sex marriage or the rights of LGBT individuals were ever at issue. *Cf. Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.*, No. 2015-CA-000745, 2017 WL 2211381 at *1 (Ky. Ct. App. May 12, 2017) (concluding that a denial of request by a heterosexual man "for t-shirts that would bear a screen-printed design with the words 'Lexington Pride Festival 2012,' the number '5,' and a series of rainbow-colored circles around the '5'" did not violate an anti-discrimination ordinance because the plaintiff was not a member of the protected LGBT class).

Phillips never let the putative customers describe the type of cake that they wanted to buy. The Solicitor

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[17] Brief for the United States as Amicus Curiae Supporting Petitioners at 4. ("They were reviewing photographs of custom cakes when they told Phillips that they wanted him to make a cake for their wedding. When he heard this, Phillips immediately knew that any wedding cake he would design for them would express messages about their union that he could not in good conscience communicate.").

General's hypothetical arguments about requiring a baker to write "God blesses this marriage" on a cake for heterosexual couple and for a same-sex couple—put simply—go far beyond the record. Brief for the United States as Amicus Curiae Supporting Petitioners at 24.

In summary, there is no concrete conflict between Colorado's effort to eliminate sexual-orientation discrimination against its citizens and the First Amendment freedoms asserted by Phillips. There is nothing in the record that takes this case beyond a bare denial of goods and services Phillips would have readily provided to any other customer. There is no basis for this Court to create an exception to Colorado's public accommodations statute in this case in particular.

CONCLUSION

The Court should affirm the judgment of the Colorado Court of Appeals.

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